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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DIANE M. JOHNSON,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE  
COUNTY,

Respondent;

WELLS FARGO HOME MORTGAGE,

Real Party in Interest.

G043414 and G043749

(Super. Ct. No. 30-2010-00342645)

O P I N I O N

Original proceedings; two petitions for a writ of mandate to challenge two orders of the Superior Court of Orange County, David C. Velasquez (G043414) and Francisco F. Firmat (G043749), Judges. Writs granted in part and denied in part.

Diane M. Johnson in pro per. for Petitioner.

No appearance for Respondent.

Severson & Werson, Suzanne M. Hankins, Jarlath M. Curran II and Jan T. Chilton for Real Party in Interest, Wells Fargo Home Mortgage, a division of Wells Fargo Bank.

\* \* \*

# 1. *Summary*

Diane Johnson, as a borrower whose home is now in the process of nonjudicial foreclosure, has brought these two writ proceedings, both arising out of her claim that her lender (real party in interest Wells Fargo Mortgage) did not comply with Civil Code sections 2923.5 and 2923.6 before recording the notice of default that began the foreclosure process. (All otherwise undesignated statutory references in this opinion are to the Civil Code.) Since both petitions for writ of mandate involve the same issue and the same parties, we now consolidate them on our own motion. (See, e.g., *Lee v. Superior Court* (2009) 177 Cal.App.4th 1108, 1122 [this court consolidated on its own motion several writ proceedings].)

This court has now given the appropriate notice required by *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171 to issue a peremptory writ of mandate in the first instance. (See generally also *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233, 1238 [“Pursuant to *Palma*, our Courts of Appeal -- prior to ordering issuance of a peremptory writ in the first instance -- provide notice that such a writ may issue, and invite informal opposition, in orders routinely called ‘*Palma* notices.’”].) Having consolidated the two proceedings, we now explain why we grant the requested writs, but only in limited part, namely the part that seeks enforcement of section 2923.5 by a stay of foreclosure pending lender compliance. In all other respects we deny the requested writs.

## *2. Background of Writ Proceeding Number G043414:*

On February 8, 2010, Diane Johnson filed: (1) a complaint for damages and for an injunction based on the alleged violation of sections 2923.5 and 2923.6 by her lender; and (2) an ex parte request for a stay of an impending foreclosure sale. (The date of foreclosure not is specified in the pleadings). The basis for the complaint was the allegation that “Plaintiff was never contacted to assess their [*sic*] financial situation and was not given any options in order to avoid foreclosure.”

The complaint also included causes of action for fraud, intentional misrepresentation, and violation of section 1572 [actual fraud], apparently based on the allegation that the borrower Johnson and lender Wells Fargo “entered into an oral contract not to foreclose,” but the lender had failed to honor that agreement. The facts supporting the allegation, however, are not quite comprehensible: Johnson, to quote the complaint verbatim: “spoke with Loss Mit Dept: initiated loan mitigation process and was told to submit the following: 2 paycheck stubs, debt info, 2 months bank statements, letter of hardship, tax return. Put loan # on each page and the process would take 90-120 days. No Sale Date at this time. faxed documents (except paycheck stubs) faxed. paycheck stubs spoke with Bety in Loss Mit Dept. [*Sic.*]”

Independent of the fraud and related causes of action, on February 9 the trial court granted the ex parte request, staying foreclosure until the hearing on Johnson’s request for a preliminary injunction, which was scheduled for March 2, 2010. In a hearing on that date, Judge Velasquez denied the request for a preliminary injunction, ruling that section 2923.5 provides no private right of action. Judge Velasquez did not resolve any factual issue as to whether the lender had ever “contacted” the borrower in compliance with section 2923.5.

Two and one-half weeks later, on March 19, borrower Johnson filed writ petition G043414. The essence of the requested relief is to ask this court to require the trial court to grant the preliminary injunction so as to stave off foreclosure. On March 24, this court granted the request for temporary stay of foreclosure. Our order reads: “The

foreclosure sale of petitioner's home is stayed pending further order of this court." We also invited an informal response, which was received on April 9.

### 3. *Background of Writ Petition Number G043749*

The foreclosure had been stayed, but the rest of Johnson's case remained, including the causes of action related to fraud and the requests for money damages for noncompliance with sections 2923.5 and 2923.6. In April, the case was transferred to Judge Firmat. Lender Wells Fargo demurred to Johnson's complaint, and the demurrer was heard May 18, 2010. The date was a little more than three weeks before this court issued its decision in *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208 (*Mabry*), on June 11, 2010.

Judge Firmat sustained the demurrer without leave as to two of Johnson's six causes of action -- cause of action number one for violation of section 2923.5, and cause of action number four for violation of section 2923.6. (The other causes of action are: number two for fraud, number three for intentional misrepresentation, number five for violation of section 1572 [as noted, defines actual fraud] and number six for unfair competition under section 17200.)

On June 8 -- a little less than three weeks later and just before this court issued *Mabry* -- Johnson filed a second writ petition, case number G043749.

Three days later, on June 11 -- the very day *Mabry* was filed -- this court stayed all trial court proceedings and invited preliminary opposition for June 26, 2010. We received that opposition June 25 and Johnson's reply to the opposition July 2. The essence of Wells Fargo's opposition is that *Mabry* controls the case.

We agree.

### 4. *Analysis of Both Petitions*

We may take judicial notice of our own files. (Evid. Code, § 452, subd. (d) ["Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451: . . . (d) Records of (1) any court of this state . . ."].)

While there was no petition for rehearing in *Mabry* from either side, the borrowers did file a petition for review in the California Supreme Court. The petition, we may note for the moment, does not seem directed at what this court said in *Mabry*, but at the idea expressed in a related unpublished decision that it makes no difference that the buyer at a foreclosure sale might be the lender itself -- there is still no action to set aside a foreclosure sale even if the lender has not complied with section 2923.5. Whether the Supreme Court shall grant review in *Mabry* is something we cannot say now. What we can say is that, for the time being, this court's decision in *Mabry* is the guiding precedent. And two of the three members of this panel were also on the panel that decided *Mabry*.

Preliminarily, we must recognize the procedural posture of Johnson's case as it presents itself to us. There is no answer on file, so, for the moment, Johnson's complaint remains uncontested. While the complaint seems to be a hodgepodge of allegations, one thing that Johnson has managed to get down on paper is the allegation that the lender didn't contact her to assess or explore options to foreclosure, as required by section 2923.5. At the pleading stage, of course, a court must accept the facts alleged in a complaint as true. (See *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 885 [allegations of complaint are deemed true "for the limited purpose of determining whether the plaintiff has stated a viable cause of action"].)

What about the admission in her complaint that she spoke with "Bety," and allegedly Bety orally agreed "not to foreclose on property"? At this stage Johnson is entitled to all reasonable inferences from the facts alleged in her complaint. (See *Duval v. Board of Trustees* (2001) 93 Cal.App.4th 902, 906 ["When a court evaluates a complaint, the plaintiff is entitled to reasonable inferences from the facts pled."].) And it is a reasonable inference that the only contact between borrower and lender here was the one *initiated* by the borrower in talking to "Bety." Section 2923.5, subdivision (b) requires the lender to have initiated the contacting, and the only excuses are in subdivision (h). None of those excuses [surrender of property, contract with a foreclosure avoidance firm, or bankruptcy] include borrower-initiated contact.

With those observations as background, the application of *Mabry* to the instant petitions yields these conclusions:

(1) Judge Firmat was correct in sustaining the demurrer without leave to amend as to any claim for monetary damages as to cause of action number one, violation of section 2923.5. *Mabry* holds that section 2923.5 does not encompass money damages.

(2) Judge Velasquez and Judge Firmat were not correct in denying Johnson a stay of foreclosure proceedings. Johnson has, based on the facts alleged in the complaint, a viable cause of action for postponement of any foreclosure sale until the lender complies with section 2923.5. The stay *of foreclosure* must remain in effect until it is established that the lender has complied with section 2923.5. If further proceedings show the lender complied *already* with section 2923.5, the foreclosure sale may take place as soon as it would otherwise be legally allowable. If those proceedings show the lender has not yet complied with section 2923.5, it must comply and re-record the notice of default. (Because the language of section 2923.5 *conditions* a notice of default on compliance with section 2923.5, compliance is necessarily a prerequisite to filing a valid notice of default.)

(3) Johnson has no cause of action of any kind for violation of section 2923.6. As we showed in *Mabry*, the language of section 2923.6 simply will not admit of any private cause of action. (See *Mabry, supra*, 185 Cal.App.4th at p. 222 [“But consider section 2923.6, which does *not* operate substantively. Section 2923.6 merely expresses the *hope* that lenders will offer loan modifications on certain terms.”].) Judge Firmat was thus correct in sustaining the demurrer without leave to amend with regard to cause of action number four (for violation of section 2923.6).

(4) Judge Firmat was correct in allowing Johnson’s complaint to proceed as to the three fraud-related causes of action, since the question of exactly what Wells Fargo’s “Bety” agreed to, if anything, is necessarily a factual matter. We express no opinion at this stage of the proceedings, as to the viability of Johnson’s sixth cause of action for violation of the unfair competition law (Bus. & Prof. Code § 17200).

Under *Mabry*, the case must thus be returned to the trial court for an evidentiary hearing as to whether Wells Fargo has complied with section 2923.5.

#### 5. *Disposition*

As noted above, this court has complied with the procedural requirements under *Palma* for the issuance of a peremptory writ in the first instance. We have received substantial briefing from both sides of this matter, and no good purpose would be served by any further delay.

Therefore, we issue a peremptory writ of mandate in the first instance directing the trial court to decide whether or not the lender (including any of the lender's agents) has complied with section 2923.5.

The stay of any *foreclosure sale* issued by this court shall remain in effect until the hearing on the lender's compliance with section 2923.5 has been concluded.

On the other hand, the stay of *all proceedings in the trial court* is hereby dissolved. If, in the hearing on the lender's compliance with section 2923.5, the trial court finds that the lender (or any agent of the lender) complied with section 2923.5 prior to filing of the notice of default in this case, the stay of the foreclosure sale issued by this court shall terminate, and the foreclosure sale may proceed as otherwise allowed by law. By contrast, if proceedings in the trial court establish that the lender has not *yet* complied with section 2923.5 (or did not comply with the section until after the notice of default was recorded), the stay issued by this court shall remain in effect until such time as it is established in the trial court that the lender has both complied with section 2923.5, and has rerecorded a notice of default. At such time, the stay of the foreclosure sale shall terminate.

In every other respect, Johnson's two petitions for writs are denied.

Because of the necessarily interlocutory nature of this proceeding, the trial court shall have discretion to add the costs of this proceeding to the party who prevails on the question of whether Wells Fargo has already complied with section 2923.5.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.